

# ORIGINAL

December 10, 1998

## FEDERAL MARITIME COMMISSION

46 CFR Part 525

Docket No. 98-27

### MARINE TERMINAL OPERATOR SCHEDULES

**AGENCY:** Federal Maritime Commission

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY :** The Federal Maritime Commission proposes to add new regulations for marine terminal operator schedules in accordance with the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

**DATES:** Submit comments on or before [Insert date thirtv (30) days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** Address all comments concerning this proposed rule to:

Joseph C. Polking, Secretary  
Federal Maritime Commission  
800 North Capitol St., N.W. Room 1046  
Washington, D.C. 20573-0001

**FOR FURTHER INFORMATION CONTACT:**

Bryant VanBrakle, Director  
Bureau of Tariffs, Certification and Licensing  
Federal Maritime Commission  
800 North Capitol St., N.W. Room 940  
Washington, D.C. 20573-0001  
(202) 523-5796

Thomas Panebianco, General Counsel  
Federal Maritime Commission  
800 North Capitol St., N.W. Room 1018  
Washington, D.C. 20573-0001  
(202) 523-5740

**SUPPLEMENTARY INFORMATION:**

The Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. 105-258, 112 Stat. 1902, and the Coast Guard Authorization Act of 1998, § 424 of Pub. L. 105-383, 112 Stat. 3411, amend the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1701 et sea., in several areas relating to marine terminal operators ("MTO(s)"). The Federal Maritime Commission ("Commission") proposes new regulations, 46 CFR part 525, which would implement changes made by OSRA to sections 3(15), 8(f), 8(g) and 10(d) of the 1984 Act.

New 46 CFR Part 525

Proposed § 525.1 implements OSRA's revision of section 3(15) of the 1984 Act by redesignating that section as 3(14) and amending the definition of MTO to extend Commission jurisdiction over those MTOs who furnish terminal services or facilities in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. That is, the Commission will have jurisdiction over an MTO who serves mixed commerce, i.e., international and domestic, rather than only those MTOs who solely serve international commerce.

In addition, the proposed rule would implement OSRA's new section (8)(f) of the 1984 Act. This section provides MTOs with the option of making their schedules of rates, regulations, and practices available to the public by publication in a terminal schedule, subject to section 10(d) of the 1984 Act, as amended by

OSRA. The 1984 Act does not currently mandate MTO tariff filing, but it is required under Commission regulations. 46 CFR § 514.1(c)(3)(i). Thus, under OSRA, MTOs will no longer be required to file their tariffs with the Commission. This option of making MTO schedules available to the public is reflected in proposed § 525.2.

Section 8(f) of OSRA also provides that terminal schedules may include limitations of liability, subject to section 10(d), for cargo loss or damage pertaining to receiving, delivering, handling or storing property at the terminal. As explained in the legislative history, such limitation of liability must be consistent with domestic law and international agreements and conventions adopted by the United States. S. Rep. No. 105-61, 105th Cong., 1st Sess., at 25 (1997) ("Report"). The Commission does not interpret this reference to limitations of liability as an implied endorsement of the validity of any such claims, which remain subject, inter alia, to the proscriptions of section 10(d) of the 1984 Act against unjust and unreasonable practices; the 1984 Act merely authorizes the publication of any asserted limitations in the terminal schedule. This is also reflected in proposed § 525.2(a) (1).

OSRA further provides in section 8(f) that, if a terminal schedule is made available by an MTO, it will be enforceable in an appropriate court as an "implied contract" between the MTO and the

party in receipt of the MTO's services. This provision ensures that MTOs are "promptly and fairly compensated for the services they provide to waterborne commerce." Report at 25. The Report language further explains that the MTO need not prove, as part of its claim to enforce the terminal schedule as an implied contract, that the party receiving the terminal services had actual knowledge of the provisions of that schedule. Id. However, any actual contract that exists between an MTO and another party for terminal services would supersede a terminal schedule made available by the MTO that covers those same services, and such a terminal schedule would not be enforceable as an implied contract. Id. The existence of an actual contract, in any event, would not relieve the MTO from liability for violations of the 1984 Act, particularly section 10(d), which prohibits an MTO from discriminating against a common carrier or an ocean tramp or from giving any undue or unreasonable preference or advantage or imposing any undue or unreasonable prejudice or disadvantage with respect to any person. This is reflected in proposed § 525.2.

In addition, section 8(g) of OSRA authorizes the Commission to prescribe, by regulation, the form and manner in which MTO schedules are published. Proposed § 525.3 implements this section by delineating how the MTOs shall make their terminal schedules "available." The proposed rule requires that any terminal schedule that is made available to the public shall be available at a

reasonable charge, if any, and during normal business hours. Neither OSRA nor the Report, however, provide whether those schedules should be published in either electronic or paper form. In accordance with the Commission's authority to prescribe form and manner, the proposed rule requires all schedules to be published in electronic form. It appears that requiring the schedules to be published in electronic form would not be a hardship on MTOs who currently must file their tariffs in an electronic form with the Commission, and would provide meaningful access to the public. The Commission specifically requests comments on whether there is a compelling reason for or against allowing MTOs to publish their terminal schedules in paper form as an alternative means of publication.

All MTOs must notify the Commission of the location of any published terminal schedules by May 1, 1998. Such notification shall be accomplished by submitting Form FMC-1 to the Commission's Bureau of Tariffs, Certification and Licensing. The Commission specifically requests comments on whether that form should be filed in paper format or in electronic format on the Commission's website at [www.fmc.gov](http://www.fmc.gov). The Commission is also considering publishing a list of the locations of the terminal schedules on its website. The Commission specifically requests comments on its proposal to publish this list on the website. In addition, any terminal schedule must contain the form and manner requirements in proposed

§ 525.3(g).

Finally, in order to enforce the prohibited acts of section 10(d), MTOs must maintain in their offices a complete and current set of their terminal schedules for a period of five (5) years, whether or not made available to the public, and shall promptly make such schedules available to the Commission upon request. This is reflected in proposed § 525.3.

The Chairman of the Commission hereby certifies, pursuant to 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, that the proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The affected universe of parties is limited to marine terminal operators. The Commission has determined that these entities do not come under the programs and policies mandated by the Small Business Regulatory Enforcement Fairness Act as they typically exceed the threshold figures for number of employees and/or annual receipts to qualify as a small entity under Small Business Administration guidelines.

The reporting and disclosure requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB). Public burden for this collection of information is estimated to average 5 hours per response. This estimate includes, as applicable, the time needed to review instructions, develop, acquire, install, and utilize technology and systems for the

purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information, search existing data sources, gather and maintain the data needed, and complete and review the collection of information; and transmit or otherwise disclose the information.

Send comments regarding the burden estimate to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Federal Maritime Commission, New Executive Office Building, 725 17<sup>th</sup> Street, N.W., Washington, D.C. 20503, within 30 days of publication in the Federal Register.

The Commission would also like to solicit comments to: (a) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) evaluate the accuracy of the Commission's burden estimates for the proposed collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposed rulemaking will be

summarized and/or included in the final rule and will become a matter of public record.

List of subjects in 46 CFR part 525

Freight, Harbors, Reporting and Recordkeeping Requirements, Warehouses.

For the reasons discussed in the preamble, the Federal Maritime Commission proposes to add part 525 to subchapter B, chapter IV of 46 CFR as follows:

PART 525--MARINE TERMINAL OPERATOR SCHEDULES

Sec.

- 525.1 Purpose and scope
- 525.2 Terminal schedules
- 525.3 Availability of terminal schedules

Authority: 46 U.S.C. app. 1702, 1707, 1709, as amended by Pub. L. 105-258, 112 Stat. 1902, and Pub. L. 105-383, 112 Stat. 3411.

525.1 Purpose and scope.

(a) Purpose. This part implements the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

(1) The form and manner requirements of this part are necessary to enable the Commission to meet its responsibilities with regard to identifying and preventing unreasonable preference or prejudice and unjust discrimination pursuant to section 10 of the Act.

(b) Scope. This part sets forth the regulations for the publication of terminal schedules by marine terminal operators.



Information made available under this part may be used to determine marine terminal operators' compliance with shipping statutes and regulations.

(c) Definitions. The following definitions apply to the regulations of this part:

(1) Act means the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

(2) Bulk cargo means cargo that is loaded and carried in bulk without mark or count.

(3) Checking means the service of counting and checking cargo against appropriate documents for the account of the cargo or the vessel, or other person requesting same.

(4) Commission means the Federal Maritime Commission.

(5) Dockage means the charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or bank or for mooring to a vessel so berthed.

(6) Effective date means the date a schedule or an element of a schedule becomes effective. Where there are multiple publications on the same day, the last schedule or element of a schedule published with the same effective date is the one effective for that day.

(7) Expiration date means the last day, after which the entire schedule or a single element of the schedule, is no longer in

effect.

(8) Forest products means forest products including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper and paper board in rolls or in pallet or skid-sized sheets, liquid or granular by-products derived from pulping and papermaking, and engineered wood products.

(9) Free time means the period specified in the terminal schedule during which cargo may occupy space assigned to it on terminal property, including off-dock facilities, free of wharf demurrage or terminal storage charges immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.

(10) Handling means the service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.

(11) Heavy lift means the service of providing heavy lift cranes and equipment for lifting cargo.

(12) Loading and unloading means the service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges or any other means of conveyance to or from the terminal facility.

(13) Marine terminal operator means a person engaged in the United States or a commonwealth, territory, or possession thereof, in the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. A marine terminal operator includes, but is not limited to, terminals owned or operated by states and their political subdivisions; railroads who perform port terminal services not covered by their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities.

(14) Organization name means an entity's name on file with the Commission and for which the Commission assigns an organization number.

(15) Person includes individuals, firms, partnerships, associations, companies, corporations, joint stock associations, trustees, receivers, agents, assignees and personal representatives.

(16) Rate means a price quoted in a schedule for providing a specified level of marine terminal service or facility for a stated cargo quantity, on and after a stated effective date or within a defined time frame.

(17) Schedule means a publication containing the actual rates, charges, classifications, regulations and practices of a marine

terminal operator. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the rates, charges or services provided by a marine terminal operator.

(18) Terminal facilities means one or more structures comprising a terminal unit, which include, but are not limited to, wharves, warehouses, covered and/or open storage spaces, cold storage plants, cranes, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

(19) Terminal services includes checking, dockage, free time, handling, heavy lift, loading and unloading, terminal storage, usage, wharfage, and wharf demurrage, as defined in this section. The definitions of terminal services set forth in this section shall be set forth in terminal schedules, except that other definitions of terminal services may be used if they are correlated by footnote, or other appropriate method, to the definitions set forth herein. Any additional services which are offered shall be listed and charges therefor shall be shown in the terminal schedule.

(20) Terminal storaae means the service of providing warehouse or other terminal facilities for the storage of inbound or outbound

cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage.

(21) Usage means the use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, its agents, servants, and/or employees, when it performs its own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(22) Wharf demurraae means a charge assessed against cargo remaining in or on terminal facilities after the expiration of free time, unless arrangements have been made for storage.

(23) Wharfage means a charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

#### § 525.2 Terminal schedules.

(a) Marine terminal operator schedules. A marine terminal operator, at its discretion, may make available to the public, subject to section 10(d) of the Act, a schedule of its rates, regulations, and practices.

(1) Limitations of liability. Any limitations of liability

for cargo loss or damage pertaining to receiving, delivering, handling, or storing property at the marine terminal contained in a terminal schedule must be consistent with domestic law and international conventions and agreements adopted by the United States; such terminal schedules cannot contain provisions that exculpate or relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

(2) Enforcement of terminal schedules. Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule.

(3) Contracts for terminal services. If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.

(b) Cargo types not subject to this part. (1) Except as set forth in paragraph (b)(2) of this section, this part does not apply to bulk cargo, forest products, recycled metal scrap, new assembled

motor vehicles, waste paper and paper waste in terminal schedules.

(2) Marine terminal operators which voluntarily make available terminal schedules covering any of the commodities identified in paragraph (b)(1) of this section thereby subject their services with respect to those commodities to the requirements of this part.

(c) Marine terminal operator agreements. The regulations relating to agreements to which a marine terminal operator is a party are located at part 535 of this chapter.

§ 525.3 Availability of marine terminal operator schedules.

(a) Availability of terminal schedules. (1) Availability to the Commission. A complete and current set of terminal schedules used by a marine terminal operator, or to which it is a party, shall be maintained in its office(s) for a period of five (5) years, whether or not made available to the public, and shall promptly be made available to the Commission upon request.

(2) Availability to the public. Any terminal schedule that is made available to the public shall be available during normal business hours and in electronic form. The public may be assessed a reasonable nondiscriminatory charge for access to the terminal schedules; no charge will be assessed against the Commission.

(b) Access to electronically published schedules. Marine terminal operators shall provide access to their terminal schedules via a personal computer (PC) by:

(1) Dial-up connection via public switched telephone networks (PSTN); or

(2) the Internet (Web) by:

(i) Web browser; or

(ii) Telnet session.

(c) Dial-up connection via PSTN. This connection option requires that terminal schedules provide:

(1) a minimum of a 14.4Kbps modem capable of receiving incoming calls,

(2) smart terminal capability for VT-100 terminal or terminal emulation access, and

(3) telephone line(s) quality for data transmission.

The modem may be included in a collection (bank) of modems as long as all modems in the bank meet the minimum speed. Smart terminal emulation provides for features such as bold, blinking, underlining and positioning to specific locations on the display screen.

(d) Internet connection. This connection option requires that systems provide:

(1) a universal resource locator (URL) Internet address (e.g., <http://www.tariffsrus.com> or <http://1.2.3.4>), and/or

(2) a universal resource locator (URL) Internet address (e.g., <telnet://tariffsrus> or <telnet://1.2.3.4>), for Telnet session access over the Internet.



Marine terminal operators shall ensure that their Internet service providers shall provide static Internet addresses.

(e) Commission access. Commission telecommunications access to systems must include connectivity via a dial-up connection over public switched telephone networks (PSTN) or a connection over the Internet. Connectivity will be provided at the expense of the publishers. Any recurring connection fees, hardware rental fees, usage fees or any other charges associated with the availability of the system are the responsibility of the publisher. The Commission shall only be responsible for the long-haul charges for PSTN calls to a terminal schedule initiated by the Commission.

(f) Notification. Each marine terminal operator shall notify the Commission's Bureau of Tariffs, Certification and Licensing ("BTCL"), prior to the commencement of marine terminal operations, of its organization name, organization number, home office address, name and telephone number of firm's representative, the location of its terminal schedule(s), and the publisher, if any, used to maintain its terminal schedule, by submitting Form FMC-1. Any changes to the above information shall be immediately transmitted to BTCL. The Commission will publish a list on its website, [www.fmc.gov](http://www.fmc.gov), of the location of any terminal schedule made available to the public.

(g) Form and manner. Each terminal schedule made available by a marine terminal operator shall contain an individual

identification number, effective date, expiration date, if any, and the complete terminal schedule in full text and/or data format showing all its rates, charges, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at their terminal facilities.

By the Commission.

  
Joseph C. Polking  
Secretary

of the Proposed Plan. As a result of requests at this meeting, the period for submitting written comments on the plan was extended one month, concluding on January 19, 1999. No public comments were received on the alternatives presented for the western tier of the On-Post OU.

EPA Region 8 announced its intent to delete the western tier parcel from the NPL on October 2, 1998 (63 FR 53005). The 30-day public comment period ended November 2, 1998, during which two letters were received. In addition to a request for additional time to comment, one of the letters contained significant comments to which EPA has responded by developing a new document specific to the western tier parcel. The document, "Further Evaluation of Surficial Soil Data from Western Tier Parcel at Rocky Mountain Arsenal (December 1998)," evaluates surficial soils for the potential future use of daycare facilities. EPA is reopening the public comment period on the proposed partial deletion for an additional 60 days.

#### Current Status

Of the three structures slated for demolition, one was determined to no longer exist (a building foundation), and the other two structures (survey tower and septic tank) were demolished in October 1997. Since the ROD was signed, three structures referred to as "vaults" were found in Section 9 of the western tier parcel. These structures were used for housing antennae associated with the Titan I Missile system deployed in northern Colorado during the late 1950s through the mid-1960s. Evaluation of the vaults confirmed that no radiological, chemical or biological materials were utilized in these structures. The vaults were removed from the western tier during the week of July 20, 1998.

The ICS extraction wells have met the ROD shut-off criteria and were shut down on October 1, 1997. Extraction wells for the Motor Pool IRA have also met shut-off criteria; therefore, the ICS facility is currently operated solely to treat contaminated ground water which is piped from the Rail Yard IRA and not associated with the western tier parcel. Monitoring of the ground water aquifer previously treated through the ICS extraction wells, as required by the ROD, has been incorporated into the sitewide monitoring program.

Use of the ground water below the western tier for potable drinking purposes is prohibited by the FFA, the RMA National Wildlife Refuge Act of 1992, and the ROD; and will continue to be prohibited even after portions of

the western tier are sold. Additional prohibitions imposed by the FFA, Refuge Act, and ROD include the use of the western tier parcel for residential, industrial, and agricultural purposes, for hunting or fishing for consumptive purposes, and the use of any future surface water as a potable source.

The December 1998 Child Care Risk Assessment document concluded that risks associated specifically with a potential future child care facility located on the western tier parcel are not above acceptable levels. These conclusions are consistent with those of previous investigations and risk assessment scenarios for the western tier which were conducted as part of the site-wide RMA/NPL Site investigations and risk assessment activities. Based on these determinations no further response actions are planned or scheduled for this area.

This remedy for soil and structures does not result in hazardous substances remaining at the site above health-based levels with respect to anticipated uses of and access to the site, which are limited under the Federal Facility Agreement, Rocky Mountain Arsenal National Wildlife Refuge Act and the ROD. All completion requirements for the western tier of the On-Post OU have been achieved as outlined in OSWER Directive 9320.2-3A. Therefore, there are no requirements for a five-year review or operation and maintenance.

EPA, with concurrence from the State of Colorado, has determined that all appropriate CERCLA response actions have been completed at the western tier parcel of the RMA/NPL Site to protect public health and the environment and that no further response action by responsible parties is required. Therefore, EPA proposes to delete the western tier of the On-Post OU of the RMA/NPL Site from the NPL.

Dated: December 8, 1998.

William P. Yellowtail,

Regional Administrator, Region 8.

[FR Doc. 98-33215 Filed 12-16-98; 8:45 am]

BILLING CODE 6580-50-P

## FEDERAL MARITIME COMMISSION

### 46 CFR Part 525

#### Marine Terminal Operator Schedules

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Federal Maritime Commission proposes to add new regulations for marine terminal operator

schedules in accordance with the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

DATES: Submit comments on or before January 19, 1999.

ADDRESSES: Address all comments concerning this proposed rule to: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol St., N.W. Room 1046, Washington, D.C. 20573-0001.

FOR FURTHER INFORMATION CONTACT: Bryant VanBrakle, Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, 800 North Capitol St., N.W. Room 940, Washington, D.C. 20573-0001, (202) 523-5796

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#### New 46 CFR part 525

Proposed § 525.1 implements OSRA's revision of section 3(15) of the 1984 Act by redesignating that section as 3(14) and amending the definition of MTO to extend Commission jurisdiction over those MTOs who furnish terminal services or facilities in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. That is, the Commission will have jurisdiction over an MTO who serves mixed commerce, i.e., international and domestic, rather than only those MTOs who solely serve international commerce.

In addition, the proposed rule would implement OSRA's new section (8)(f) of the 1984 Act. This section provides MTOs with the option of making their schedules of rates, regulations, and practices available to the public by publication in a terminal schedule, subject to section 10(d) of the 1984 Act, as amended by OSRA. The 1984 Act does not currently mandate MTO tariff filing, but it is required under

Commission regulations. 46 CFR 514.1(c)(3)(i). Thus, under QSRA, MTOs will no longer be required to file their tariffs with the Commission. This option of making MTO schedules available to the public is reflected in proposed § 525.2.

Section 8(f) of OSRA also provides that terminal schedules may include limitations of liability, subject to section 10(d), for cargo loss or damage pertaining to receiving, delivering, handling or storing property at the terminal. As explained in the legislative history, such limitation of liability must be consistent with domestic law and international agreements and conventions adopted by the United States. S. Rep. No. 105-61, 105th Cong., 1st Sess., at 25 (1997) ("Report"). The Commission does not interpret this reference to limitations of liability as an implied endorsement of the validity of any such claims, which remain subject, *inter alia*, to the proscriptions of section 10(d) of the 1984 Act against unjust and unreasonable practices; the 1984 Act merely authorizes the publication of any asserted limitations in the terminal schedule. This is also reflected in proposed § 525.2(a)(1).

OSRA further provides in section 8(f) that, if a terminal schedule is made available by an MTO, it will be enforceable in an appropriate court as an "implied contract" between the MTO and the party in receipt of the MTO's services. This provision ensures that MTOs are "promptly and fairly compensated for the services they provide to waterborne commerce." Report at 25. The Report language further explains that the MTO need not prove, as part of its claim to enforce the terminal schedule as an implied contract, that the party receiving the terminal services had actual knowledge of the provisions of that schedule. *Id.* However, any actual contract that exists between an MTO and another party for terminal services would supersede a terminal schedule made available by the MTO that covers those same services, and such a terminal schedule would not be enforceable as an implied contract. *Id.* The existence of an actual contract, in any event, would not relieve the MTO from liability for violations of the 1984 Act, particularly section 10(d), which prohibits an MTO from discriminating against a common carrier or an ocean tramp or from giving any undue or unreasonable preference or advantage or imposing any undue or unreasonable prejudice or disadvantage with respect to any person. This is reflected in proposed § 525.2.

In addition, section 8(g) of OSRA authorizes the Commission to prescribe,

by regulation, the form and manner in which MTO schedules are published. Proposed § 525.3 implements this section by delineating how the MTOs shall make their terminal schedules "available." The proposed rule requires that any terminal schedule that is made available to the public shall be available at a reasonable charge, if any, and during normal business hours. Neither OSRA nor the Report, however, provide whether those schedules should be published in either electronic or paper form. In accordance with the Commission's authority to prescribe form and manner, the proposed rule requires all schedules to be published in electronic form. It appears that requiring the schedules to be published in electronic form would not be a hardship on MTOs who currently must file their tariffs in an electronic form with the Commission, and would provide meaningful access to the public. The Commission specifically requests comments on whether there is a compelling reason for or against allowing MTOs to publish their terminal schedules in paper form as an alternative means of publication.

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Finally, in order to enforce the prohibited acts of section 10(d), MTOs must maintain in their offices a complete and current set of their terminal schedules for a period of five (5) years, whether or not made available to the public, and shall promptly make such schedules available to the Commission upon request. This is reflected in proposed § 525.3.

The Chairman of the Commission hereby certifies, pursuant to 605 of the Regulatory Flexibility Act, 5 U.S.C. 605, that the proposed rules will not, if promulgated, have a significant economic impact on a substantial number of small entities. The affected universe of parties is limited to marine

terminal operators. The Commission has determined that these entities do not come under the programs and policies mandated by the Small Business -Regulatory Enforcement Fairness Act as they typically exceed the threshold figures for number of employees and/or annual receipts to qualify as a small entity under Small Business Administration guidelines.

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Send comments regarding the burden estimate to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention Desk Officer for the Federal Maritime Commission, New Executive Office Building, 725 17th Street, N.W., Washington, D.C. 20503, within 30 days of publication in the Federal Register.

The Commission would also like to solicit comments to: (a) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) evaluate the accuracy of the Commission's burden estimates for the proposed collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposed rulemaking will be summarized and/or included in the final rule and will become a matter of public record.

**List of Subjects in 46 CFR Part 525**

Freight, **Harbors**, Reporting and recordkeeping **requirements**, Warehouses.

For the reasons discussed in the preamble, the Federal Maritime Commission **proposes** to add part 525 to subchapter B, chapter IV of 48 CFR as follows:

**PART 525—MARINE TERMINAL OPERATOR SCHEDULES****Sec.**

**525.1** Purpose and scope.

**525.2** Terminal schedules.

**525.3** Availability of **marine** terminal operator schedules.

**Authority:** 46 U.S.C. app. 1702, 1707, 1709, as amended by Pub. L. 105-258, 112 Stat. 1902, and Pub. L. 105-383, 112 Stat. 3411.

**gaze.1 Purpose and scope.**

(a) Purpose. This part implements the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998. The form and **manner** requirements of **this** part are necessary to enable the Commission to meet its responsibilities with regard to identifying and preventing unreasonable preference or **prejudice** and unjust discrimination pursuant to section 10 of the Act.

(b) Scope. This part sets **forth** the regulations for the **publication** of terminal schedules by **marine** terminal operators. Information made available under this part may be used to determine marine terminal operators' compliance with shipping statutes and regulations.

(c) **Definitions.** The following definitions apply to the regulations of this part:

(1) **Act means the** Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 and the Coast Guard Authorization Act of 1998.

(2) **Bulk cargo means** cargo that is loaded and carried in bulk without mark or count.

(3) **Checking means the service** of counting and checking cargo against appropriate documents for **the** account of **the** cargo or the vessel, or other person requesting same.

(4) **Commission means** the Federal Maritime Commission.

(5) **Dockage means the** charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or bank or for mooring to a vessel so berthed.

(6) **Effective date** means the date a schedule or an element of a schedule becomes effective. Where there are multiple publications on the same day,

the last schedule or element of a schedule published with the same effective date is the one effective for that day.

(7) **Expiration date** means the last day, after which the entire schedule or a single element of the schedule, is no longer in effect.

(8) **Forest products** means forest products including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper and paper board in rolls or in pallet or skid-sized sheets, liquid or granular by-products derived from pulping and papermaking, and engineered wood products.

(9) **Free time** means the period specified in the terminal schedule during which cargo may occupy space assigned to it on terminal property, including off-dock facilities, free of wharf demurrage or terminal storage charges immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.

(10) **Handling** means the service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.

(11) **Heavy lift** means the service of providing heavy lift cranes and equipment for lifting cargo.

(12) **Loading and unloading** means the service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges or any other means of conveyance to or from the terminal facility.

(13) **Marine terminal operator** means a person engaged in the United States or a commonwealth, territory, or possession thereof, in the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. A marine terminal operator includes, but is not limited to, terminals owned or operated by states and their political subdivisions; railroads who perform port terminal services not covered by their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities.

(14) **Organization name** means an entity's name on file with the Commission and for which the Commission assigns an organization number.

(15) **Person** includes individuals, firms, partnerships, associations, companies, corporations, joint **stock** associations, trustees, receivers, **agents**, assignees and personal representatives.

(16) **Rate** means a mice auoted in a schedule for providing a specified level of marine terminal service or facility for a stated cargo quantity, on and after a stated effective date or within a defined time frame.

(17) **Schedule** means a publication containing the actual rates, charges, classifications, regulations and practices of a marine terminal operator. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the rates, charges or services provided by a marine terminal operator.

(18) **Terminal facilities** means one or more structures comprising a terminal unit, which include, but are not limited to, wharves, warehouses, covered and/or open storage spaces, cold storage plants, cranes, grain elevators **and/or** bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo **and/or** passengers in the interchange of same between land and water carriers or between two water carriers.

(19) **Terminal services** includes checking, dockage, free time, handling, heavy lift, loading and unloading, terminal storage, usage, wharfage, and wharf demurrage, as defined in this section. The definitions of terminal services set forth in this section shall be set forth in terminal schedules, except that other definitions of terminal services may be used if they are correlated by footnote, or other appropriate method, to the definitions set forth herein. Any additional services which are offered shall be listed and charges **therefor** shall be shown in the terminal schedule.

(20) **Terminal storage** means the service of providing warehouse or other terminal facilities for the storage of inbound or outbound cargo after the expiration of free time, including wharf storage, **shipside** storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage.

(21) **Usage** means the use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, its agents, servants, and/or employees, when it performs its own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(22) **Wharf demurrage** means a charge assessed against cargo remaining in or on terminal facilities after the expiration

of free time, unless arrangements have been made for storage.

(23) **Wharfage means a charge** assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. **Wharfage is** solely the charge for use of wharf and does not include charges for any other service.

#### § 525.2 Terminal schedules.

(a) Marine terminal operator **edules.** A marine terminal operator, at its discretion, may make available to the public, subject to section 10(d) of the Act, a schedule of its rates, regulations, and practices.

(1) **Limitations of liability.** Any limitations of liability for cargo loss or damage pertaining to receiving, delivering, handling, or storing property at the marine terminal contained in a terminal schedule must be consistent with domestic law and international conventions and agreements adopted by the United States; such terminal schedules cannot contain provisions that exculpate or relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

(2) **Enforcement of terminal schedules.** Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule.

(3) **Contracts for terminal services.** If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.

(b) **Cargo types not subject to this part.** (1) Except as set forth in paragraph (b)(2) of this section, this part does not apply to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper and paper waste in terminal schedules.

(2) Marine terminal operators which voluntarily make available terminal schedules covering any of the commodities identified in paragraph (b)(1) of this section thereby subject their services with respect to those

commodities to the requirements of this part.

(c) **Marine terminal operator agreements.** The regulations relating to agreements to which a marine terminal operator is a party are located at part 535 of this chapter.

#### § 525.3 Availability of marine terminal operator schedules.

(a) **Availability of terminal schedules.**

(1) **Availability to the Commission.** A complete and current set of terminal schedules used by a marine terminal operator, or to which it is a party, shall be maintained in its office(s) for a period of five (5) years, whether or not made available to the public, and shall promptly be made available to the Commission upon request.

(2) **Availability to the public.** Any terminal schedule that is made available to the public shall be available during normal business hours and in electronic form. The public may be assessed a reasonable nondiscriminatory charge for access to the terminal schedules; no charge will be assessed against the Commission.

(b) **Access to electronically published schedules.** Marine terminal operators shall provide access to their terminal schedules via a personal computer (PC) by:

(1) Dial-up connection via public switched telephone networks (PSTN); or

(2) The Internet (Web) by:

(i) Web browser; or

(ii) Telnet session.

(c) **Dial-up connection via PSTN.** (1) This connection option requires that terminal schedules provide:

(i) A minimum of a 14.4Kbps modem capable of receiving incoming calls,

(ii) Smart terminal capability for VT-100 terminal or terminal emulation access, and

(iii) telephone line(s) quality for data transmission.

(2) The modem may be included in a collection (bank) of modems as long as all modems in the bank meet the minimum speed. Smart terminal emulation provides for features such as bold, blinking, underlining and positioning to specific locations on the display screen.

(d) **Internet connection.** (1) This connection option requires that systems provide:

(i) A universal resource locator (URL) Internet address (e.g., <http://www.tariffsrus.com> or <http://1.2.3.4>), and/or

(ii) A universal resource locator (URL) Internet address (e.g., <telnet://tariffsrus> or <telnet://1.2.3.4>), for Telnet session access over the Internet.

(2) Marine terminal operators shall ensure that their Internet service

providers shall provide static Internet addresses.

(e) **Commission access.** Commission telecommunications access to systems must include connectivity via a dial-up connection over public switched telephone networks (PSTN) or a connection over the Internet.

Connectivity will be provided at the expense of the publishers. Any recurring connection fees, hardware rental fees, usage fees or any other charges associated with the availability of the system are the responsibility of the publisher. The Commission shall only be responsible for the long-haul charges for PSTN calls to a terminal schedule initiated by the Commission.

(f) **Notification.** Each marine terminal operator shall notify the Commission's Bureau of Tariffs, Certification and Licensing ("BTCL"), prior to the commencement of marine terminal operations, of its organization name, organization number, home office address, name and telephone number of firm's representative, the location of its terminal schedule(s), and the publisher, if any, used to maintain its terminal schedule, by submitting Form FMC-1. Any changes to the above information shall be immediately transmitted to BTCL. The Commission will publish a list on its website, [www.fmc.gov](http://www.fmc.gov), of the location of any terminal schedule made available to the public.

(g) **Form and manner.** Each terminal schedule made available by a marine terminal operator shall contain an individual identification number, effective date, expiration date, if any, and the complete terminal schedule in full text and/or data format showing all its rates, charges, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at their terminal facilities.

By the Commission

Joseph C. Poking.

Secretary

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#### FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2, 74, 78, 101

[ET Docket No. 95-18; FCC 98-309]

#### Allocation of Spectrum at 2 GHz for Use by the Mobile-Satellite Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.